Lotteworld Engineering & Construction Sdn Bhd v Castle Inn Sdn Bhd & Anor (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D6-22-2540 OF 1998
REKHRAJ J
14 DECEMBER 1998

Civil Procedure *— Injunction — Erinford injunction — Whether Erinford injunction could be granted if effect is to restrain beneficiary from receiving money under a performance bond — Whether Erinford injunction should be granted pending appeal against order refusing application for an injunction*

The High Court had refused the plaintiff's application for an injunction against the first defendant from further calling or receiving money from the second defendant under a performance bond. The plaintiff intended to appeal against the said decision and in the interim, applied for an interim Erinford injunction or 'Erinford stay' to preserve the status quo of the parties, pending appeal. The court had to consider whether there are reasonable grounds of appeal and whether there are special circumstances justifying in the granting or its refusal.

Held, dismissing the application:
Taking all the factors in the balance and the purport and intent of the performance bond, and the decision in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd*, to grant an Erinford stay would only be undermining or frustrating the beneficiary, ie the first defendant, of his entitlement. The court had earlier refused the injunction as sought by the plaintiff, pending trial or arbitration, and will not, in the instant case, subvert indirectly by granting the stay (see p 52C–D); *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 followed.

[Bahasa Malaysia summary

Mahkamah Tinggi telah menolak permohonan plaintif untuk satu injunksi terhadap defendan pertama daripada meminta atau menerima wang daripada defendan kedua di bawah satu bon pelaksanaan. Plaintif berniat untuk merayu terhadap keputusan tersebut dan di dalam interim, memohon untuk satu injunksi Erinford atau 'penggantungan Erinford' yang interim untuk mengekalkan status quo di antara pihak-pihak, sementara menunggu rayuan. Mahkamah terpaksa mempertimbangkan sama ada terdapat alasan-alasan rayuan yang munasabah dan sama ada terdapat keadaan yang istimewa yang menjustifikasikan pemberian atau penolakannya.

Diputuskan, menolak permohonan:
Dengan mengambil kira semua faktor-faktor dalam keseimbangannya dan tujuan serta niat bon pelaksanaan tersebut, dan keputusan dalam *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd*, pemberian satu

penggantungan Erinford akan hanya menjejaskan atau menghalang benefisiari tersebut, iaitu defendan pertama daripada hak beliau. Mahkamah telah pada lebih awalnya enggan memberikan injunksi seperti yang dipohon oleh plaintif, sementara menunggu perbicaraan atau timbangtara, dan tidak akan, dalam kes semasa, menjatuhkan hak benefisiari secara tidak langsung dengan memberikan penggantungan tersebut (lihat ms 52C–D); *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 diikut.]

Notes

For cases on Erinford injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1952–1953.

For a case on interlocutory injunction to restrain receipt of moneys under performance bond, 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2199.

Cases referred to

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149 (folld)

Legislation referred to

Rules of the High Court 1980 O 29 r 1(1)

Vincent Lim (*Kenneth Lye* and *Yap Hsu Lyin* with him) (*Vincent Lim & Teoh*) for the plaintiff.

Bill Davidson (*Lim Chong Fong* and *Annabel Chua* with him) (*Azman, Davidson & Co*) for the first defendant.

Rekhraj J: Upon the delivery of the judgment in refusing the plaintiff's call for an injunction from further calling or receiving the money from the second named defendant under the performance bond, the plaintiff's counsel informed the court of the desire to lodge an appeal against the said decision; and further gave undertaking to file the same in due course; but in the interim, wanted an interim Erinford Injunction under O 29 r 1(1) of the Rules of the High Court 1980.

Erinford Injunction or 'Erinford stay' is a form of prohibitory order applied for by the plaintiff, who had failed in his interlocutory application for an interim injunction to restrain the defendant from dealing with the subject matter pending appeal; on the ground that should the appellant succeed in its appeal, then the appeal will be rendered nugatory, unless an order is made to preserve the status quo.

The court in determining this application had to consider whether there are reasonable grounds of appeal, and whether there are special circumstances justifying in the granting or its refusal; and in that direction guided itself:

(i) whether or not there is a serious question to be tried; and

(ii) whether the first named defendant's financial position is impecunious (as it would not then be in a position to refund the sum in the event, the appeal is successful). No evidence was led by the plaintiff to that effect in support except a bare averment; and

(iii) the balance of convenience weighed in the circumstances.

The plaintiff's concern was more to preserve the status quo, pending the hearing of the appeal; and expressed great concern over the possible insolvency of the first named defendant. (But the converse can equally be true; in that the plaintiff may also find itself 'hopelessly insolvent' — leading to insolvency).

Taking all these factors in the balance and the purport and intent of the Performance Bond — as a *security; readily available* for realisation upon demand, *notwithstanding any contestation or protest by the plaintiff*; and the decision of the Supreme Court in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 — that no injunctive relief can be made available to restrain the beneficiary from receiving the sum under the performance bond; I held, that to grant an Erinford stay would only be undermining or frustrating the beneficiary of his entitlement because the court has earlier refused the injunction as sought pending trial or arbitration, and therefore this court will not now subvert indirectly by granting the stay which the plaintiff failed to obtain in the first instance in their unsuccessful application for injunction. Application for stay is refused.

Application dismissed.

Reported by Tan Kah Bee